RECENT CASES

ACTION—JOINDER OF ACTIONS—LIABILITY OF MASTER AND SERVANT.—LOUISVILLE & N. R. Co. v. ABERNATHY (1916) 73 So. (ALA.) 103.—In an action against the railroad and its servant, an engineer, as defendants, the plaintiff set out in one count that he was run over by a train of the defendant and injured by the wilful and wanton act of the defendant's engineer acting within the scope of his employment. *Held,* that the count stated an action in trespass against the engineer and in trespass on the case against the railroad, and that, under the Alabama Code, these two actions could not be joined in one count. Mayfield, Gardner, and Thomas, JJ., *dissenting.*

A plaintiff could not recover in trespass against a master for the wilful trespass of a servant, unless he could show actual participation by the master, under the old rules as laid down in *City Delivery Co. v. Henry* (1903) 139 Ala. 161. He could, however, recover in trespass on the case. But he was not allowed to join trespass on the case against the master with trespass against the servant. *Southern R. R. Co. v. Hanby* (1910) 166 Ala. 641. The principal case follows the same doctrine. At common law trespass and trespass on the case could not be joined because they were separate and distinct actions and required separate judgments. *Courtney v. Collet* (1697) 1 Raym. 272; *Cooper v. Bissell* (1819) 16 Johns. (N. Y.) 146; *Dale Mfg. Co. v. Grant* (1870) 34 N. J. L. 138. But when the same judgment was applicable to both forms of action, as in Maryland, they were permitted to be joined. *Gladfelter v. Walker* (1873) 38 Md. 110; *Williams v. Bramble* (1852) 2 Md. 313. In many states because of the statutes attempting to abolish the distinction between trespass and trespass on the case, joinder is allowed. *Bellant v. Brown* (1889) 78 Mich. 294; *Barker v. Koozier* (1875) 80 Ill. 205; *Henshaw v. Noble* (1857) 7 Oh. St. 226. In Alabama, under the Code of 1896, sec. 3293, joinder of trespass and trespass on the case was permitted when both related to the same subject matter, though the statute preserved the common law distinctions between the two actions. *Louisville & N. R. R. Co. v. Higginbotham* (1907) 153 Ala. 334. Sec. 5329 of the Code of 1907 was designed to give a broader scope to the above, and provides that all actions *ex delicto* may be joined in the same suit. An action of trespass on the case and an action of trespass against the same person can be joined. Likewise an action of trespass on the case against the master can be joined with an action of trespass on the case against the servant even in the same count. *Southern Ry. Co. v. Arnold* (1979) 162 Ala. 570. It seems that trespass against the servant should be allowed to be joined with trespass on the case against the master. The holding of the majority judges in the principal case gives a narrow interpretation to the Code and lays down a rule which, while it is theoretically correct, is arbitrary. Joinder would not violate the terms of purpose of the Code.

S. J. T.

BILLS AND NOTES—ALTERATION—HOLDER IN DUE COURSE.—PUBLIC BANK V. KNOX-BURCHARD MERCANTILE CO. ET AL. (1916) 160 N. W. (MINN.) 667.—The defendant, Burchard, as accommodation party joined with G. C. Knox in executing and endorsing individually their note to the order of themselves, which Knox thereafter altered by stamping before their personal signatures the words, "Knox-Burchard Mercantile Co. by" and adding the abbeviations "Pres." and "Sec." respectively after their names, and by making changes on the reverse side whereby the instrument purported to be the note of the company, endorsed by it and individually by each of the officers. The plaintiff received the paper for value and without notice. *Held,* that the plaintiff might recover against the defendant Burchard, according to the original tenor of the note.

The decision in this case depends upon whether the title of the plaintiff is based on a forgery, or whether the bank is a holder in due course of an instrument altered in a material particular. If the former, the bank may not enforce payment against Burchard. Negotiable Instruments Law, sec. 23. If the latter, however, it is entitled to recover according to the original tenor. Negotiable Instruments Law, sec. 124. The defendant contended that the section concerning alterations applies only to changes in the body of the instrument. Prior to the act, however, entries altering the signature on a note and changing it from an individual obligation so that it appeared to be that of a firm, were regarded as material alterations. *Haskell v. Champion* (1860) 30 Mo. 136; *Chadwick v. Eastman* (1864) 53 Me. 12; *Montgomery v. Crossthwait* (1890) 8 So. (Ala.) 498. Even when some of the makers' signatures placed on a joint and several note before delivery were forgeries, these have not been permitted to affect the liability of those parties whose signatures were genuine. *First Nat. Bank of Durand v. Shaw* (1909) 157 Mich. 192. Since the note in the principal case was to the order of the makers and required their endorsement before it was complete for negotiation, it would seem possible to regard all the altered signatures as forgeries and still leave unaffected the liability of Burchard on his genuine, unaltered endorsement. But taking the apparently more satisfactory view, that the changes made were material alterations only, then the fact that they were made by a co-maker will not relieve the defendant, Burchard, from answering to a holder in due course. *Builders' Lime and Cement Co. v. Weiner* (1915) 170 Ia. 444. The reason usually given for the rule is that where one of two innocent parties must suffer, he who has made it possible for the injury to be committed shall be the loser. It is submitted, however, that the reason is suggestive of some remote degree of negligence, which seems entirely lacking in the principal case, wherein the alteration was accomplished by a clever trick. One is likely to feel, nevertheless, that the defendant, being held only to the obligation he assumed and the damages which he might reasonably have counted upon, should not be protected as against a holder in due course. Moreover, since the provisions of the Negotiable Instrument Law, considered in the light of previous cases, seem to warrant this interpretation, which makes for the currency of credit paper, there would appear to be ample ground for the decision of the court in the principal case.

M. S. B.

CARRIERS—LIMITATION OF CARRIER'S LIABILITY FOR LOSS OF BAGGAGE.—NEW YORK CENTRAL & HUDSON R. R. Co. v. BEAHAM (1916) 37 SUP. CT. REP. 43.—An interstate passenger purchased a ticket on the face of which was printed the condition limiting the liability for baggage to $100 unless an excess charge was paid for any valuation over that amount. The ticket was presented at the baggage department and a trunk check containing the same conditions was received. The trunk was lost and the passenger sued to recover its reasonable value, disclaiming any knowledge of the condition. *Held,* that the acceptance and use of the ticket established *prima facie* an assent to the terms printed thereon, and that mere failure by the passenger to read the ticket could not overcome the presumption of assent.

As a matter of public policy it has generally been held that a carrier cannot by agreement with the passenger free itself absolutely from its common-law liability for negligence. *Brown v. Eastern R. Co.* (1853) 11 Cush. (Mass.) 97; *Saunders v. Southern R. Co.* (1904) 128 Fed. 15; *Buckland v. Adams Exp. Co.* (1867) 97 Mass. 124. But for a carrier to fix charges in proportion to the value of the property is quite as reasonable as to make the rate depend upon the character of the shipment. *In the Matter of Released Rates* (1908) 13 I. C. C. Rep. 550; *N. Y. C. & H. R. R. Co. v. Fraloff* (1880) 100 U. S. 24; *Kansas City So. R. Co. v. Carl* (1912) 227 U. S. 391. A shipper's assent to the limitation on the carrier's liability is presumed where the limitation appears in the terms of the ticket or check, or in the published rates. *Adams Exp. Co. v. Croninger* (1912) 226 U. S. 491; *B. & M. R. Co. v. Hooker* (1913) 233 U. S. 97; *Aiken v. Wabash R. Co.* (1899) 80 Mo. App. 8; *cf.* Cal. Civil Code (1901) sec. 2176. The limitation on the carrier's liability is valid because the lower valuation by the passenger is made for the purpose of obtaining the lower of two rates. *Hart v. Pa. R. Co.* (1881) 112 U. S. 337; *Mo. K. & T. R. Co. v. Harriman* (1912) 227 U. S. 657; *Adams Exp. Co. v. Croninger, supra.* It seems just that a shipper should not be allowed to reap the benefit if no loss occurs, and to repudiate the transaction in the event of loss A limitation based on an agreed value for the purpose of adjusting rates cannot be said to conflict with public policy.

R. L. S.

CARRIERS—PLACE OF DELIVERY—REBATE.—NEW YORK CENT. & H. R. R. Co. v. GENERAL ELECTRIC Co. (1916) 144 N. E. (N. Y.) 115.—Defendant's plant covered 180 acres, and contained an elaborate system of privately operated tracks connecting its various buildings. In a suit by plaintiff for freight charges, defendant counterclaimed for allowance for transporting goods over the tracks within its plant. *Held,* that such an allowance would be a rebate under the Interstate Commerce Act.

Before the days of railroads, common carriers were expected to make delivery at the consignee's home or place of business. *Fenner v. Buffalo & State Line R. R.* (1871) 44 N. Y. 505. But with an expansion of commerce and transportation facilities, delivery was expected to be made at freight-houses, or on private side-tracks. Vast development of industrial

plants, like that in the principal case, presents a new phase of the question as to when delivery is completed, and it is difficult to determine where the carrier's duty of delivery ends. It has been held that a common carrier is not bound to deliver interstate freight on a private side-track. *McNeil v. So. R. R.* (1906) 202 U. S. 543. A railroad is not bound to deliver cars of livestock at a yard operated by a competing company, though directly connected therewith by its own tracks, and the power to make such an order does not exist under the Interstate Commerce Act. *Cent. Stockyards v. L. P. & N. R. R. Co.* (1904) 192 U. S. 568. Tracks privately constructed involving intricate connections between plant buildings are "plant facilities," and a railroad cannot lawfully compensate the consignees for the use of these tracks with the latter's own motive power. Such an allowance would amount to a rebate. *Crane Iron Works v. C. R. R. of N. Y.* (1910) 17 I. C. C. Rep. 514; *General Electric Case* (1908) 14 I. C. C. Rep. 237; *Karl Lumber Co. v. G. Ry. Co.* (1911) 20 I. C. C. Rep. 450. It would seem that the system of tracks operated by the defendants in the principal case, were within the term "plant facility" and, therefore, the company was not only not entitled to compensation from the railroad for hauling freight over them to their various buildings, but such an allowance would have been a rebate under the Interstate Commerce Act.

L. J. N.

CONSTITUTIONAL LAW—AUTOMOBILE REGISTRATION—DISCRIMINATION AGAINST NON-RESIDENT.—KANE v. STATE OF NEW JERSEY (1916) 37 SUP. CT. REP. 30.—The New Jersey automobile laws (1908) provided for the registration of all automobiles driven within the state. The registration fee was $3.00 for machines of less than ten horsepower, $5.00 for those of less than thirty, and $10.00 for those of thirty or more. *Held,* that since the annual fees prescribed were not so large as to be unreasonable, this requirement was valid and not an unconstitutional discrimination against non-residents.

The highways of the state are primarily for public use, and the legislature has regulative control over them. *White Oak Coal Co. v. Manchester* (1909) 109 Va. 749. In the exercise of this power, the legislature may provide for the registration of vehicles and the payment of fees therefor. *People v. Schneider* (1905) 139 Mich. 673; *Buffalo v. Lewis* (1908) 192 N. Y. 193. The registration is a police regulation, partly for the purpose of identification. *Allen v. Smith* (1912) 84 Oh. St. 283; *State v. Mayo* (1909) 106 Me. 62. A reasonable fee is a license fee, not a tax. *Commonwealth v. Boyd* (1905) 188 Mass. 79. It follows that the constitutional requirements of uniform taxation do not apply. *In re Kessler* (1915) 26 Idaho, 764. The fees may be graded according to horse power instead of being *ad valorem. Matter of Schuler* (1914) 167 Cal. 282; *Bozeman v. State* (1913) 7 Ala. App. 151. Where the fee is reasonable in amount, it does not become a tax merely because a portion of the fund so raised is used to maintain and police the highways. *Jackson v. Neff* (1912) 64 Fla. 326; *In re William Hoffert* (1914) 34 S. D. 271; but see *Vernon v. Sec'y of State* (1914) 179 Mich 157. Where non-residents are compelled to observe the same regulations as residents, there is

no discrimination against them which violates the federal constitution, for discrimination involves the placing of a heavier burden on the one, or the conferring of a special privilege on the other. *Home Ins. Co. v. New York* (1890) 134 U. S. 594; *Giozza v. Tiernan* (1893) 148 U. S. 657. For other New Jersey cases in point, see *Unwen v. State* (1906) 73 N. J. L. 529; *Cleary v. Johnston* (1909) 79 N. J. L. 49.

A. S. B.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—FOOD—REGULATION OF THE PERCENTAGE OF BUTTER FAT IN ICE CREAM.—HUTCHINSON ICE CREAM CO. V. IOWA (1916) 37 SUP. CT. REP. 28.—An Iowa statute prohibited the sale as ice cream of a product containing less than a fixed percentage of butter fat. *Held,* that the statute did not take property without due process of law, as the percentage required was, of itself, not unreasonable.

Statutes directed against adulteration of foods with deleterious substances have long been regarded as within the police power of the state. On this ground a recent decision holds that the sale of food preservatives containing boric acid may be prohibited by statute in order to protect the public health. *Price v. Illinois* (1914) 238 U. S. 446. As a further step in the protection of the public, other statutes have been sustained which aim at practices which deceive the buying public in regard either to quantity, nature, or ingredients of the article offered for sale, even where there is no doubt of its being wholesome. For example, North Dakota has been upheld in prescribing certain weights in multiples of which package lard must be sold. *Armour & Co. v. North Dakota* (1915) 240 U. S. 510. Likewise, it was held that the city of Chicago could regulate the amount of bread in bakers' loaves. *Schmidinger v. Chicago* (1912) 226 U. S. 578. Also, by Missouri, New York, and Illinois statutes, distilled vinegar may not be colored in imitation of the cider product. *State v. Earl* (1911) 152 Mo. App. 235; *People v. Spencer* (1911) 201 N. Y. 105; *People v. Wm. Henning Co.* (1913) 260 Ill. 554. Neither may oleomargarine be colored in imitation of butter. *People v. Guiton* (1912) 137 N. Y. S. 600. Many states provide a statutory minimum percentage of butter fat in all milk offered for sale. *State v. Schlenker* (1900) 112 Ia. 642; *Commonwealth v. Wheeler* (1910) 205 Mass. 384. In the principal case it was contended that ice cream is a compound and need not, if wholesomely made, contain milk or cream. On the ground of protecting the public from misrepresentation, even in compound food products, the Supreme Court of Michigan recently declared constitutional a statute under which sausage containing more than two per cent of cereal was treated as adulterated, although the adulteration was manifestly not deleterious. The principal case is representative of the modern tendency of the Supreme Court to sanction an ever-extending police power protection of the public against misrepresentation as well as against injury to health. It affirms the great weight of state authority and seems clearly correct. On a similar state of facts, however, see the contrary decision in *Rigbers v. City of Atlanta* (1910) 7 Ga. App. 411. Possibly the limitations of a city charter may be responsible for the view there taken.

M. S. B.

CONSTITUTIONAL LAW—STATUTORY DEFINITION OF PUBLIC NUISANCE—INJUNCTION AGAINST MAINTENANCE.—PEOPLE EX REL. THRASHER V. SMITH ET AL. (1916) 114 N. E. (ILL.) 31.—Illinois Laws (1915) p. 371 enacted that all buildings and the fixtures and movable contents thereof used for purposes of assignation or prostitution are public nuisances; that the maintenance thereof may be enjoined; that the court may order that the premises be kept closed by the sheriff for one year (unless security be given to abate the nuisance); that the sheriff may remove all fixtures and movable property, sell them, and after payment of costs pay over the proceeds to the owner. *Held,* that the statute was valid, and proceedings under this act was not a deprivation of property without due process of law.

The police power is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. *Lawton v. Steel* (1894) 152 U. S. 133. No vested or constitutional right exists to use, or allow the use of property for purposes injurious to either public health or morals. *State v. New England Furniture, etc., Co. et al.* (1914) 126 Minn. 78. Every owner of property holds title thereto subject to the authority of the state so to regulate its use and enjoyment as to prevent and abate public nuisances, and the enforcement of that authority works no legal wrong. *City of Waterloo v. Waterloo, etc., R. Co.* (1910) 149 Ia. 129. The interference by the state, however, must be confined to the prohibition of the wrongful use. Where the nuisance consists not in the building itself, but in the use to which it is put, the building cannot be destroyed. *Welch v. Stowell* (1846) 2 Doug. (Mich.) 332. Statutes similar to the one in the principal case have been enacted in other jurisdictions, and their constitutionality uphold. *State v. Fanning* (1914) 96 Neb. 123; *State v. Jerome* (1914) 80 Wash. 261; *State v. Ryder* (1914) 126 Minn. 95. It seems then that the act in its remedial details as well as its general purpose, was a proper exercise of the police power under the test that a police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion.

E. J. M.

COPYRIGHT—MUSICAL COMPOSITION—INFRINGEMENT—PERFORMANCE FOR PROFIT.—HERBERT V. SHANLEY CO. (JAN. 22, 1917) 242 U. S. 591, 37 SUP. CT. REP. 232.—The plaintiff was the owner of a copyrighted musical composition which the defendant caused to be sung in his public dining-room. No admission fee was charged. The plaintiff sought an injunction on the ground that this act of the defendant infringed the exclusive right of the plaintiff to perform the work publicly for profit under the Copyright Act of March 4, 1909 (35 U. S. St. 1075). *Held,* that this was an infringement of plaintiff's rights under the copyright.

The only case directly in point is that of *Sarpy v. Holland* (1909) 99 L. T. 317. This case on a similar set of facts decided that an entertainment like that in the principal case was a performance for profit, and

within the prohobition of the English Copyright Act of 1908. However, entertainments of a like nature have been held exempt from the operation of statutes which require all non-gratuitous performances to be licensed, on the ground that they are not for profit. *People v. Martin* (1912) 137 N. Y. S. 677 (cabaret show in restaurant); *People v. Wacke* (1912) 77 Misc. Rep. (N. Y.) 196 (moving pictures in hotel bar-room); *People v. Royal* (1897) 23 App. Div. (N. Y.) 258; *contra, Weisblatt v. Bingham* (1908) 58 Misc. Rep. (N. Y.) 328. An entertainment given for the patrons of a restaurant who are admitted on the understanding, either express or implied, that they make some purchase, is not essentially different from an entertainment for which an admission fee is charged. Undoubtedly, the purpose in providing these elaborate entertainments is to attract a larger and more wealthy patronage which is willing to pay higher prices than are exacted elsewhere for the privilege of enjoying meals in an atmosphere made more congenial by the diversions furnished by paid entertainers. As a case of first impression it would seem that the decision, although unsupported by authorities, is correct.

L. J. N.

EMINENT DOMAIN—TAKING OF PROPERTY FOR PRIVATE USE.—VETTER ET AL. V. BROADHURST (1916) 160 N. W. (NEB.) 109.—A and B were the owners of adjacent tracts of land. A, under sec. 3444, Neb. Rev. St. (1913) made application for the condemnation of a part of the land of B as a site for a reservoir from which to irrigate the land of A. *Held,* that the right of eminent domain could not be exercised for a purely private purpose.

"Public use" as applied to the exercise of the power of eminent domain is not capable of an exact definition. Some courts hold that "public use" means "use by the public"; that is public employment, and consequently that, to make a use public, a duty must devolve on the person holding property appropriated by right of eminent domain to furnish the public with the use intended, and the public must be entitled, as of right, to use or enjoy the property taken. *Wisconsin River Improvement Co. v. Pier* (1908) 137 Wis. 325; *Dice v. Sherman* (1907) 107 Va. 424. Another view is that "public use" means "public advantage," and that anything which contributes to the general welfare and the prosperity of the whole community constitutes a public use. *McMeekin v. Cent. Carolina Power Co.* (1908) 80 S. C. 512; *Tanner v. Treasury Tunnel, etc., Co.* (1906) 35 Col. 593. Other courts hold that the true definition of "public use" lies somewhere between these two. *Brown v. Gerald* (1905) 100 Me. 351; *Albright v. Sussex Co. etc., Commission* (1904) 71 N. J. L. 303. There are exceptional cases, under the theory of "public advantage," where the peculiar circumstances of climate and soil, as in Utah, permit condemnation for private purposes. *Clark v. Nash* (1905) 198 U. S. 361. It is certain that the government may not under any circumstances divest one citizen of his estate for the benefit of another where the public interest is in no way involved, even though compensation is made. *Ozark Coal Co. v. Penn, etc., R. Co.* (1911) 97 Ark. 495. The fact that the public will be incidentally benefited by the appropriation is not sufficient to

supply the power, when the taking is purely for a private purpose. *Jeter v. Vinton-Roanoke Water Co.* (1913) 114 Va. 769; *Thom v. Georgia Mfg. Co.* (1907) 128 Ga. 187. The principal case, while sustaining the theory of "public advantage" in general, does not consider the conditions in Nebraska sufficient to widen its scope of application.

E. J. M.

EVIDENCE—PRESUMPTIONS—RES IPSA LOQUITUR—SUFFICIENCY OF EVIDENCE.—FANSHAWE V. RAWLINS (1916) 98 ATL. (N. J.) 439.—In an action to recover for the care and board of the defendant's horses, the defendant set up a counterclaim for an injury to a mare which he proved occurred while the mare was at pasture on the plaintiff's farm. He offered no additional facts as evidence to show that the plaintiff was negligent, but asked for an instruction that the burden of proof shifted, which was refused. *Held,* that there was an error, as the doctrine of *res ipsa loquitur,* though applicable, warranted merely a submission of the question to the jury.

Where the doctrine of *res ipsa loquitur* has been clearly and distinctly presented, most courts have held in the case of agisters, as well as in negligence cases generally, that the burden of proving negligence affirmatively is on the plaintiff. *Nichols v. Union Stockyards and Transit Co.* (1916) 193 Ill. App. 14; *Everitt v. Foley* (1907) 132 Ill. App. 438; *Whitaker v. Chicago, St. P. M. and O. R. Co.* (1911) 115 Minn. 140. A few courts (principally in South Carolina) have held that where it is shown that an injury happened while the animal or chattel was in the care of the defendant, the doctrine of *res ipsa loquitur* applies and the burden of proof shifts to the defendant. *Nutt v. Davison* (1913) 54 Col. 586; *Sullivan v. Charleston and W. C. R. Co.* (1910) 85 S. C. 532. But the burden of proof, in the sense of the risk of non-persuasion, never shifts during the course of a trial, but remains with the plaintiff to the end. *Casey v. Donovan* (1896) 65 Mo. App. 521. In the sense of the necessity of going forward with the evidence, to meet a *prima facie* case, the burden of proof may shift, but this does not mean that the defendant must show by the preponderance of the evidence that he used due care. *Briglio v. Holt* (1915) 147 Pac. (Wash.) 877. The principal case follows the majority rule, holding that the occurrence of an injury is merely *prima facie* evidence which may warrant, but does not compel, an inference of negligence, and does not necessarily amount to proof. *Mumma v. Easton and A. R. Co.* (1905) 73 N. J. L. 653. Unless the facts are such that only one inference can be drawn, the question is one for the jury. *Vaughn v. Bixby* (1914) 24 Cal. App. 641. The function of the maxim of *res ipso loquitur,* therefore, is merely to carry the question of negligence past the court into the field of the jury. *Sewell v. Detroit United R. Co.* (1909) 158 Mich. 407.

S. J. T.

EVIDENCE—SUBSTANTIVE LAW—ORAL AGREEMENT VARYING WRITTEN CONTRACT—PARTIAL FAILURE OF CONSIDERATION.—INTERNATIONAL HARVESTER CO. V. PARHAM (1916) 90 S. E. (N. C.) 503.—A note recited on its face that it was given for a manure spreader. The maker offered to prove

a contemporaneous oral agreement that the payee was to deliver a knife grinder also, and contended that a delivery of it was a condition precedent to his liability on the note. *Held,* that the oral agreement would be effective to show a partial failure of consideration, but not to show the non-performance of a condition precedent. Allen and Walker, JJ., *dissenting.*

As between the immediate parties to a note or others having notice, oral agreements affecting the fixed or implied terms of the note are admissible. Wigmore, *Evidence,* Vol. IV, pp. 2443. So the consideration may be shown by oral evidence, and the fact that part is recited does not make the oral agreement ineffective. *Everhart v. Puckett* (1881) 73 Ind. 409; *Stringfellow v. Ivie* (1882) 72 Ala. 209. However, an oral agreement subjecting the note to a condition or contingency, or affecting the time of payment, or the amount of payment, is invalid, since it affects the variable or expressed terms of the obligation. *Leonard v. Miner* (1898) 120 Cal. 403; *Wood v. Surrells* (1878) 89 Ill. 107; *Kelsey v. Chamberlain* (1881) 47 Mich. 241; *Loudermilk v. Loudermilk* (1893) 93 Ga. 443. Therefore, it seems the majority opinion of the court was correct.

J. N. M.

INJUNCTION—SOLICITING OF CUSTOMERS OF FORMER EMPLOYER.—NEW METHOD LAUNDRY CO. v. JOHN W. MACCANN (1916) 161 PAC. (CAL.) 990.—Defendant, after several years of employment by the plaintiff as a driver and solicitor for laundry work, left his position without notice and engaged himself in a like situation with a rival firm, soliciting laundry work from among his former employer's customers and receiving some of their business. *Held,* that an injunction would lie for soliciting, but not for receiving work from the patrons of his former employer.

For a discussion of the principles involved in this case, see 25 YALE LAW JOURNAL, 499.

L. J. N.

POLICE POWER—VALID EXERCISE—BILL-BOARDS.—THOS. CUSACK CO. v. CHICAGO (JAN. 15, 1917) 242 U. S. 526, 37 SUP. CT. REP. 190.—An ordinance of the city of Chicago prohibited the erection of bill-boards in residence sections without first obtaining the consent in writing of the owners of a majority of the frontage on both sides of the street in the block. *Held,* that the ordinance was constitutional and not an unrestrained or arbitrary exercise of the police power.

It was contended that this ordinance violated the Fifth Amendment of the Federal Constitution. The first eight amendments, however, apply exclusively to the exercise of power by the Federal government. *Eilenbecker v. Plymouth County* (1890) 134 U. S. 31. It was also contended that such an ordinance was a delegation of legislative authority to the whims and caprices of neighboring property owners. The Supreme Court

of Illinois had ruled that by the statutes of Illinois bill-board advertising was subject to municipal control. *Cusack Co. v. Chicago* (1915) 267 Ill. 344. This decision, so far as the U. S. Supreme Court was concerned, settled that the ordinance attacked, was within the scope of the powers of the city, and so valid unless clearly unreasonable and arbitrary. The sole question before the court, therefore, was of the reasonableness of the ordinance. It is settled that the "due process" clause does not have the effect of overriding the power of the state to establish all regulations that are reasonably necessary for the general welfare; that power can neither be abdicated nor bargained away. *Slaughter House Cases* (1873) 16 Wall. (U. S.) 36; *Munn v. Illinois* (1877) 94 U. S. 113; *Beer Co. v. Mass.* (1879) 97 U. S. 25. The court found in the principal case that the evidence before the trial court showed the propriety of putting bill-boards, as distinguished from buildings and fences, in a class by themselves, and to justify a prohibition of their erection in residence districts in order to protect the "safety, morality, health and decency of the community." Since an absolute prohibition of the erection of bill-boards would have been permissible, it is clear that there is nothing unreasonable in relaxing the prohibition when the owners of a majority of the frontage in the block consent that this shall be done. A similar thing is done frequently in the case of saloons, *Swift v. People* (1896) 162 Ill. 534; and garages, *People v. Ericsson* (1914) 203 Ill. 368. The principal case seems to be in accord with the weight of authority.

G. S., JR.

PRINCIPAL AND AGENT—PAYMENT TO AGENT—CHECKS.—POTTER V. SAGER ET AL. (1916) 161 N. Y. S. 1088.—A was the agent of plaintiff to collect a debt from the defendant. The defendant gave A a check made payable to himself. A cashed the check and converted the proceeds. *Held,* that there was no payment or discharge of the debt.

It is well settled that an agent to collect has no authority to accept anything in payment except money. *Baldwin v. Tucker* (1901) 112 Ky. 282; *Parker v. Leach* (1906) 107 N. W. (Neb.) 217. It follows that the agent has no authority to take as payment, property, the note of the debtor, or a time check. *Reynolds v. Ferree* (1877) 86 Ill. 570; *Holt v. Schneider* (1899) 57 Neb. 523; *Spence v. Rose* (1886) 28 W. Va. 333; *Hadley Milling Co. v. Kelley* (1915) 174 S. W. (Ark.) 227. A check if not paid, though turned over to the principal and accepted by him, is not a discharge of the debt. This, however, is on the theory that the check itself is only a conditional payment. *Max Freund v. Importers & Traders Nat'l Bank* (1879) 76 N. Y. 352; *U. S. Nat'l Bank of Omaha v. Geer* (1898) 55 Neb. 462. But if a check payable to the agent is given to the agent for immediate presentation, and the check is in fact paid, it amounts to a payment in cash and is a discharge of the debt. *Thomas Roberts Stevenson Co. v. Fox* (1897) 43 N. Y. S. 253; *Cohen v. O'Connor* (1873) 5 Daly (N. Y.) 28; see *Hadley Milling Co. v. Kelley, supra.* The agent may be considered the agent of the debtor for cashing the check, but he receives the money as agent of the creditor.

J. N. M.

SERVICE OF PROCESS—JURISDICTION IN PERSONAM OVER NON-RESIDENT.—KANE V. STATE OF NEW JERSEY (1916) 37 SUP. CT. REP. 30.—By the laws of New Jersey (N. J. Laws, 1908, pp. 613) a non-resident is required to register his automobile, pay a license fee, and file with the secretary of state a duly executed instrument constituting that official his attorney upon whom all original process in any action or legal proceedings brought against him and arising out of the operation of the automobile within the state, may be served. *Held,* that in an action *in personam,* jurisdiction could be obtained by such service of process on the secretary of state.

The long tradition of English law has been that service on a defendant must be formal and personal. Accordingly, in the absence of any express power given by the principal authorizing his agent to accept service, jurisdiction over the principal cannot be effected by service on the agent, however great his authority may be with reference to the business of the principal. Piggot, *Foreign Judgments,* Part I, p. 283; *Conley v. Mathieson Alkaline Works* (1902) 190 U. S. 406; *Martin v. New Trinidad L. A. Co.* (1904) 130 Fed. 394. A personal judgment against a non-resident who has not been served within the state, and who has not appeared or assented expressly or impliedly to the mode of constructive or substituted service adopted, is invalid even in the state where rendered. *Laughlin v. La. & N. O. Ice Co.* (1883) 35 La. Ann. 1184; *Freeman v. Alderson* (1886) 119 U. S. 188; *Pennoyer v. Neff* (1877) 95 U. S. 714. Service of process is within legislative control, subject, however, to constitutional limitations. *Thomas v. Mahone* (1872) 9 Bush (Ky.) 111; *McCauley v. Fulton* (1872) 44 Cal. 355. A state statute authorizing service of summons in an action *in personam* upon the agent of a non-resident, where the agent has not been appointed to accept service, would violate the requirement of due process of law. *Brooks v. Dunn* (1892) 51 Fed. 138; *Moredock v. Kirby* (1902) 118 Fed. 184; *National Bank v. Peabody* (1883) 55 Vt. 492. However, jurisdiction of the person may be conferred by consent. *Brown v. Woody, Adm'r.* (1876) 64 Mo. 547; *cf. Wilson v. Seligman* (1892) 144 U. S. 41; *Pennoyer v. Neff, supra.* A common example of this is found where foreign corporations do business in a state which requires them to appoint an agent for service of process before allowing them to transact business within the state. The law may, and ordinarily does, designate this agent or officer on whom process is to be so served. *State v. St. Mary's Franco-American P. Co.* (1905) 58 W. Va. 108; *Woodward v. Mutual Reserve Life Ins. Co.* (1904) 178 N. Y. 485. In the principal case the state had the power to exclude motorists until they consented to reasonable regulation and paid the license fee. *Kane v. New Jersey* (1911) 81 N. J. L. 594; *Hendrick v. Maryland* (1915) 235 U. S. 610. It seems that reasonable regulation permits a stipulation for service of process on a designated agent, the secretary of state.

A. S. B.

WILLS—DEVISE TO DECEASED CHILD—RIGHTS OF DEVISEE'S CHILDREN.—KEHL V. TAYLOR ET AL. (1916) 114 N. E. (ILL.) 125.—The statute of Descent of Illinois (Hurd's Rev. St. 1915-16, c. 39) sec. ii, provided that when a devisee, being a child or grandchild of testator, should predecease

such testator, and no provision should have been made for such contingency, the issue of such devisee shall take the devise. The testator, after making several dispositions, devised the remainder of his estate to his "children." A grandchild, to whom a specific devise was made by name, but whose mother was a daughter of the testator who had died before the will was made, claimed to inherit her mother's share under a residuary devise to the "children" of testator. *Held*, that she could recover under the above statute.

Since a will speaks as of the time of the testator's death, the members of the class are *prima facie* to be determined at the death of the testator. *Ruggles v. Randall* (1897) 70 Conn. 44. *Richardson v. Willis* (1895) 163 Mass. 130; *Buzby v. Roberts* (1895) 53 N. J. Eq. 566. The English Statute to prevent lapses is construed to apply only to a devise or legacy to a person named and not to a class, irrespective of whether the death of the member of the class occurs before, or after the date of the will. *Olney v. Bates* (1855) 3 Drew. 319; *Re Harvey* [1893] 1 Ch. 537. But it has been generally held in the United States that statutory provisions to prevent lapses, apply to a devise or legacy to a class. *Strong v. Smith* (1891) 84 Mich. 567; *In re Bradley's Estate* (1895) 166 Pa. St. 300; *Jones v. Hunt* (1896) 96 Tenn. 369. However, this is not an unyielding rule, and the will itself may indicate a contrary intention, and if so, this intent will be adopted and enforced. *In re Swenson's Estate* (1893) 55 Minn. 300; *Bailey v. Brown* (1897) 19 R. I. 669. The question resolves itself into this: Does the statute apply where the devise is to a class, one of the members of which is dead at the time the will is made, so that the heirs of the deceased member may take? The decisions are irreconcilable. Those holding the affirmative are: *Bray v. Pullen* (1892) 84 Me. 185; *Moses v. Allen* (1889) 81 Me. 268; *Jamison v. Hay* (1870) 46 Mo. 546; *Wildberger v. Cheek's Executors* (1897) 94 Va. 517. In other jurisdictions statutes like that in the principal case are held not to apply where the devisee is dead at the time of the execution of the will. *White v. Institute* (1898) 171 Mass. 84; *Lindsey v. Pleasants* (1846) 39 N. C. 320; *Tolbert v. Burns* (1888) 82 Ga. 213. It is believed that the weight of authority is in favor of the proposition that a bequest to a class does not include persons dead before the making of the will, who, had they survived until that time, would have fallen within the description of that class, unless there is something in the will, or surrounding circumstances to show a different intent on the part of the testator. Inasmuch as the plaintiff in the principal case was provided for elsewhere in the will, it is questionable if the testator intended to have her take again under the devise to the children.

L. J. N.

WILLS—PRESUMPTION—CONSTRUCTION.—DES BOEUF v. DES BOEUF (1916) 113 N. E. (Ill.) 900.—The third clause of a will read: "It is my will that the balance of my estate, both real and personal, all descend to my wife, Julia, and my son, Felix, as the statutes of the state of Illinois provide." *Held*, that it must be presumed that the testator did not intend to die intestate as to any property and that the word "descend" cannot be taken

in its usual technical meaning; but the will must be construed as declaring that, aside from small bequests to grandchildren, the property should be divided according to the statutes of distribution, so that the wife would take one-third and the son the remainder of the personalty, together with the realty subject to the dower and homestead rights of the wife.

There is a presumption, unless it clearly appears to the contrary, that the testator wished to dispose of all his property. *King v. King* (1898) 168 Ill 273; *In re Lloyds Estate* (1899) 188 Pa. St. 451. The word "descend" as distinguished from "purchase" is used in its technical sense to describe the devolution of realty to the heirs at law by operation of law. See *Tichenor v. Brewer's Executor* (1897) 98 Ky. 349; *Potts v. Kline* (1896) 174 Pa. St. 513. In the principal case the testator apparently had two things in mind: (1) that the widow and son should take all the residuary estate; (2) that the widow should take her part which belonged to her as a widow, and that the son should take his part as if he were the only heir thereto, as both would have done if no will had been made. The words "descend," "inherit" and "inheritance" are frequently given an expanded meaning by legislatures and applied to personalty. *Roundtree v. Russell* (1895) 11 Ind. App. 522. The term "descend" has been construed as legatory, giving a granddaughter a vested remainder. *Timberlake v. Parish's Executor* (1838) 5 Dana (Ky.) 345. A widow has been allowed to take as a "right heir" under a statute which created a surviving wife a statutory heir. *Peabody v. Cook* (1909) 201 Mass. 212. In several English cases, however, the phrase "right heirs," has been construed to mean heirs at common law. *Young v. Gibbons* [1902] I Ch. 336; *De Beauvoir v. De Beauvoir* (1870) 3 H. L. Cas. 524. If the intention is manifest from the intrinsic and such extrinsic evidence as can be brought in, the property will pass. *Patch v. White* (1886) 117 U. S. 210; *Posley v. Newton* (1908) 199 Mass. 421. The written expression must express the testator's intention approximately although not necessarily with exactness. The court in the principal case seems to haye adopted a common sense view.

G. S., Jr.